Date: July 22, 1997

Case No.: 96-INA-2

In the Matter of:

HELENA KUCZYNSKA,
Employer

On Behalf Of:

ANNA DOBIECKA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On January 24, 1995, Helena Kuczynska ("Employer") filed an application for labor certification to enable Anna Dobiecka ("Alien") to fill the position of Cook, Polish Specialty, Live-out (AF 37-38). The job duties for the position are:

> Prepares, seasons, and cooks soups, meats vegetables etc. according to the principles of Polish cuisine. Bakes, broils, and steams meat and fish and other food. Prepares Polish specialty meals such [as] pierogis, borscht, cold beet soup, stuffed cabbage, blintzes, beef sirloin Tartar style. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Accounts for the expenses incurred in purchasing foodstuffs. Decorates dishes according to nature of celebration.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on April 21, 1995 (AF 41-44), proposing to deny certification on the grounds that it does not appear feasible that the job duties as described constitute full-time employment as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3) in the context of her household. Additionally, the CO directed the Employer to provide a copy of a telephone bill addressed to her at her address in order to establish that she actually does reside at the address indicated on the ETA 750A form. Lastly, the CO requested the Employer to explain why she is willing to wait for the Alien to be labor certified as opposed to hiring a more immediately available U.S. worker.

Accordingly, the Employer was notified that she had until May 26, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 26, 1995 (AF 45-95), the Employer contended that her household consists of herself, her husband, their two sons, ages 14 and 15, and her Mother. She stated that her Mother has been doing the cooking duties for the past seven years but that because of her age, her health has failed recently and she has been hospitalized several times and she will no longer be able to perform the cooking duties. The Employer included with her rebuttal a letter from her Mother to this effect. The Employer further stated that she and her husband frequently entertain subcontractors, customers, and potential customers of her husband's.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The Employer included in her rebuttal a schedule of daily and weekly cooking duties to be performed by the Cook. She advised that the Cook will also be responsible for about 10 extra meals on Tuesdays and Thursdays for their business guests, and four extra meals on Saturdays for their personal guests. The Employer included a list of the dates they have entertained business guests for the year of 1994 and four months in 1995. She then stated that they have been ordering food for their business dinners. The Employer included with her rebuttal copies of restaurant bills. The Employer advised that all household maintenance duties are performed by her.

Next, the Employer contended that this is a *bona fide* job opportunity. She included with her rebuttal a copy of a telephone bill as requested in the NOF, and several recipes. In response to the CO's question regarding why she is willing to wait for labor certification for the Alien, the Employer stated:

> The above statement, I find to be suggestive that the reviewing personnel is not familiar with the case at issue, perhaps not even familiar with the premise on which employer, as myself, files an application for alien employment certification. It also introduces a speculation, which is not permitted under alien labor certification regulations. It may even suggest discriminatory attitude of the said personnel.
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> The facts of the matter are, that the U.S. labor market had been tested adequately, and I have proven that there an [sic] no qualified U.S. workers willing to accept the employment offered. There had been a total of zero responses to my newspaper ad, published in the New York Newsday for a period of three days.

The CO issued the Final Determination on June 14, 1995 (AF 96-98), denying certification because it does not appear that a full-time job opportunity exists in this household. The CO determined that "the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category.

On July 17, 1995, the Employer requested review of the Denial of Labor Certification or a full hearing (AF 99-115). On September 22, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position

is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 42-43). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In rebuttal, the Employer explained that her household consists of herself, her husband, their two sons, and her Mother (AF 93). She stated that her Mother had been assigned the cooking duties for the past seven years; however, due to failing health, she cannot continue performing these duties. The Employer provided a typical schedule the Alien will be required to follow, along with preparation time for each meal (AF 91-92). In summary, the Alien will be required to cook two breakfasts, five lunches, three afternoon meals, and five dinners per day. She provided recipes to illustrate the variable length of time required to prepare certain meals (AF 45-55). In addition, the Employer stated that she and her husband have 10 extra dinner guests on Tuesdays and Thursdays, as well as on the weekends. She provided the dates of entertainment for the previous calendar year (AF 88). The Employer further stated that the Alien will not be required to perform any non-cooking related duties, which are performed by the Employer (AF 87). Finally, the Employer stated that her husband works from 7:00 a.m. until 5:00 p.m. and her children are in school from 8:30 a.m. until 3:00 p.m.

As indicated, the issue here is whether or not the CO's conclusion that full-time employment is not being offered is a reasonable inference from these facts. However, we are unable to make that determination at this time, as the CO has raised a new issue for the first time in the Final Determination. In a letter dated June 14, 1994, the Employer stated that she has part-time help to perform the household maintenance duties (AF 5). However, in her Rebuttal, the Employer stated that she performs all of the household maintenance duties (AF 87). As such, the CO, in the FD, noted this inconsistency and further noted that the Employer did not offer an explanation (AF 97). We find that the CO should have issued a second NOF, to give the Employer an opportunity to respond to this new issue.

Accordingly, this matter must be remanded for the Certifying Officer to issue a new NOF and permit the Employer an opportunity to rebut.

However, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The

job requirements include two years of experience in the job duties of Polish cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Polish cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Polish foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT).

ORDER

The Certifying Officer's denial of labor certification is hereby **REMANDED** for further action consistent with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. On remand, I would direct the CO's attention, as well as Employer/Alien, to the case of *Teresita Tecson*, 94-INA-014 (May 30, 1995), wherein it was held that a three-month requirement for experience in Filipino cooking was found unduly restrictive. My research reveals no cases of "specialty" or "ethnic" domestic cook cases decided by the Board to the contrary. In my opinion, the burden of demonstrating that the requirement of an "ethnic" type of cooking such as "kosher cook" for a cook/domestic is high, since as stated in *Tecson*, "The business in this case is the operation of the household." If an employer "prefers" a certain type of cooking, he can, of course, instruct the cook to do so. However, to require such experience as a part of the job opportunity has a "chilling effect" on U.S. workers who might otherwise be qualified and willing to do the job.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.